

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**LUKE M. BRITTO**

Claimant

V.

**OLDCASTLE PRECAST, INC**

Respondent

AND

**LIBERTY INSURANCE CORPORATION**

Insurance Carrier

Docket No. 1,066,280

**ORDER**

Claimant, by and through Roger D. Fincher, of Topeka, requested review of Administrative Law Judge Rebecca Sanders' February 10, 2015 Award. Respondent and insurance carrier (respondent) appeared by and through Kristina D. Schlake, of Kansas City. The Board heard oral argument on June 2, 2015.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the Award's stipulations. At oral argument, the parties agreed claimant's legal date of injury by repetitive trauma was April 19, 2013, his last day worked for respondent. Claimant's attorney noted the case was pled as an injury by repetitive trauma because claimant did not file a timely application for hearing for a traumatic accident on April 1, 2010. Respondent's counsel agreed an application for hearing was not timely filed for such date of accident.

**ISSUES**

Claimant alleged a left shoulder injury by repetitive trauma from April 1, 2010 to April 19, 2013. The judge denied benefits, finding claimant's injury did not arise out of and in the course of his employment because he had a non-compensable aggravation of preexisting degenerative joint disease.

Claimant requests the Award be reversed, arguing his work activities were the prevailing factor in causing personal injury by repetitive trauma arising out of and in the course of his employment. Claimant argues he is entitled to a 15% permanent partial impairment to his left shoulder and future medical treatment. Claimant argues his retained medical expert knew about his repetitive work over a period of years and such favorable causation opinion is more reliable than respondent's expert's contrary opinion. Claimant argues respondent's retained medical expert only focused on a single date of accident – April 1, 2010 – but failed to account for claimant's repetitive work that caused injury over the next three years.

Respondent maintains the Award should be affirmed. Respondent noted claimant had a specific left shoulder injury on April 1, 2010, but did not timely file an application for hearing. Respondent denied claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment and his asserted repetitive work was the prevailing factor causing his injury. Respondent argues claimant's medical expert's opinion regarding an injury by repetitive trauma was largely based on a letter from claimant's attorney containing beginning and ending dates of injury and not information received from claimant about an April 1, 2010 accident only. Respondent further argues that while claimant may have aggravated his left shoulder due to his work, a mere aggravation of a preexisting condition is not compensable under the post-May 15, 2011 law.

The issues<sup>1</sup> are:

1. Did claimant meet with personal injury by repetitive trauma arising out of and in the course of his employment and was his asserted repetitive work the prevailing factor causing his injury?
2. What is the nature and extent of claimant's disability?
3. Is claimant entitled to unauthorized and future medical compensation?

#### **FINDINGS OF FACT**

Respondent makes concrete products, such as manhole covers, curbing inlets and jail cells. Claimant, 54 years old, worked approximately 34 years at the same location, starting in 1979 and for respondent starting in 2005. He was a working foreman. His job duties included assigning and directing work in three departments, which would take the first 10-15 minutes of each day, in addition to helping those departments by running machines, running a forklift, running pipe, making cages, pouring forms, setting up, running a crane, sweeping, shoveling, building product, finishing and cleaning.

On or around April 1, 2010, claimant was pouring concrete. He was pulling on a "mud" bucket when he felt left shoulder pain. "Mud" is slang for cement. He was no longer able to perform the task and asked another employee to take over, but he continued other tasks. Claimant testified that within 30 minutes, he reported the accident to the safety manager, who was not his supervisor. Claimant testified he was supposed to report accidents to the safety coordinator.

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<sup>1</sup> Respondent argued claimant did not give timely notice of his April 1, 2010 accident. Claimant asserts he provided respondent timely notice within 30 minutes of first developing pain on April 1, 2010, and again on or near April 5, 2013. This issue is moot because the April 1, 2010 accident is barred by the three year limitation in K.S.A. 44-534 and respondent does not contest notice for an injury by repetitive trauma.

Claimant's left shoulder still bothered him and began popping. Some time in 2010, he sought treatment with Douglas Iliff, M.D., his primary care physician. Dr. Iliff injected claimant's left shoulder, which helped his symptoms. Other than the injection and a follow-up visit with Dr. Iliff to let him know his shoulder was better, claimant denied any additional left shoulder treatment or evaluations.

Between 2010 and 2013, claimant continued performing his regular duties. He testified his left shoulder worsened. He testified he used his left arm more than his right because of non-work-related problems with his right shoulder. Claimant could not think of any reasons his left shoulder worsened, other than his work. On April 5, 2013, his left shoulder pain had increased to the point where he reported the problem to the plant manager. Respondent referred him to physician assistant David Couch.

Claimant was first examined by Mr. Couch on April 8, 2013. During the course of treatment, Mr. Couch provided medication, x-rays, an MRI and physical therapy. Claimant told Mr. Couch that his left shoulder had been bothering him "for years."<sup>2</sup> Claimant was referred to Daniel Stechschulte, M.D., an orthopedic surgeon.

Claimant's last day of work with respondent was Friday, April 19, 2013. The following Monday, he had right shoulder replacement surgery and did not return to work because no job was available. Claimant testified his right shoulder was replaced because of osteoarthritis. Again, claimant's right shoulder problems are not part of this claim.

On June 4, 2013, claimant saw Dr. Stechschulte, who reviewed medical records, took a history and performed a physical examination. Claimant complained of grinding and occasional popping (crepitus) in his left shoulder. Claimant told Dr. Stechschulte he felt a sharp pain on or about April 1, 2010, but did not seek evaluation at the time "because [he] thought it was no big deal and [he] had plenty of help, anyway."<sup>3</sup> Claimant stated he asked to be evaluated in April 2013 "because it kept getting worse and then one day [he] couldn't change [his] spark plugs."<sup>4</sup>

Dr. Stechschulte testified claimant had glenohumeral joint crepitus, acromioclavicular joint tenderness, an intact rotator cuff exam and no weakness. Dr. Stechschulte reviewed x-rays showing joint space narrowing, osteophytosis and sclerosis, which are characteristics of degenerative joint disease. He also reviewed the MRI films, which showed degenerative arthritis, tendonitis, tendonosis of the rotator cuff and some degeneration in the biceps.

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<sup>2</sup> R.H. Trans. at 30.

<sup>3</sup> Stechschulte Depo., Ex. 2 at 1.

<sup>4</sup> *Id.*, Ex. 2 at 1.

Dr. Stechschulte's impressions were that claimant had an exacerbation of preexisting glenohumeral and acromioclavicular degenerative joint disease, as well as left shoulder rotator cuff tendinitis. He diagnosed claimant with degenerative arthritis of the shoulder.<sup>5</sup> Dr. Stechschulte released claimant to full duty and recommended continued home exercise and weight loss.

In addressing prevailing factor, Dr. Stechschulte stated:

After review of the provided records, radiographs, and physical exam findings, we feel the patient's reported injury of 04/01/2010 is [not the] primary and prevailing factor for his current [left] shoulder complaints, within a reasonable degree of medical certainty. His findings are primarily degenerative, and he did not find the time to have the shoulder evaluated until more than three years after the alleged event. This suggests a more chronic, degenerative condition, rather than something caused by work activities.<sup>6</sup>

Dr. Stechschulte also stated claimant's repetitive work from April 2010 through April 2013 did not cause his shoulder condition. Dr. Stechschulte testified claimant did not tell him that his condition worsened from repetitive work from April 2010 through April 2013.<sup>7</sup>

On cross-examination, Dr. Stechschulte acknowledged not knowing what type of work claimant performed – other than pulling mud buckets – and how often he would lift objects at work. He agreed it would be best to know what work activities claimant performed during the three year period after April 2010. Dr. Stechschulte was not aware claimant used his left arm more than his right arm between 2010 and 2013, nor that he had an injection in his left shoulder. The doctor generally agreed that someone who lifts heavy objects is more likely to suffer shoulder tears as compared to someone who does light work, but downplayed the likelihood claimant's shoulder problem was on account of tears.<sup>8</sup>

On September 20, 2013, at the request of his attorney, claimant saw Edward Prostic, M.D., an orthopedic surgeon. Dr. Prostic reviewed medical records, took a history and performed a physical examination. He did not review the actual MRI films. Claimant reported left shoulder pain and difficulty lying on his left side. According to Dr. Prostic's report, claimant indicated he had repetitious injuries to his left shoulder while working for respondent from April 1, 2010 through April 19, 2013, commencing when he forcefully lifted a mud bucket.

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<sup>5</sup> *Id.* at 6, 8 and 9.

<sup>6</sup> *Id.*, Ex. 2 at 3.

<sup>7</sup> *Id.* at 15 and 17.

<sup>8</sup> *Id.* at 21-22 ("I'm not sure that Mr. Britto's problems are related to any tearing.").

Dr. Prostic's physical examination revealed a  $\frac{3}{4}$ " decrease in claimant's left upper arm circumference as compared to his dominant right arm. There was no significant tenderness. Range of motion was almost complete without crepitus or instability, but mild to moderate weakness during range of motion testing. Dr. Prostic's review of x-rays revealed good glenohumeral joint space, but a humeral head spur.

Dr. Prostic's report stated:

During the course of his employment at April 1, 2010 through April 19, 2013, Luke M. Britto sustained injuries to his left shoulder. He has a combination of difficulties of the biceps tendon, rotator cuff, and glenohumeral arthritis. Eventually, he will need total shoulder replacement arthroplasty. If possible, his claim should be settled with open medical benefits. Permanent partial impairment is presently rated at 15% of the left upper extremity. The work-related trauma April 1, 2010 through April 19, 2013 is the prevailing factor in the injury, the medical condition, and the need for medical treatment as well as the resulting disability or impairment.<sup>9</sup>

Dr. Prostic indicated claimant's rating was pursuant to the AMA *Guides*<sup>10</sup> (hereafter *Guides*), but stated the *Guides* do not adequately address shoulder weakness and x-ray changes. Dr. Prostic testified his impairment rating was based on atrophy, weakness and arthritic change and his professional experience and not specific portions of the *Guides*.

Dr. Prostic noted claimant's forceful pulling on the handle of the mud bucket on April 1, 2010, was a distinct trauma sufficient to cause the partial tearing of the biceps tendon found on the MRI. Dr. Prostic testified all of claimant's MRI results were consistent with degenerative changes to his left shoulder.<sup>11</sup>

Dr. Prostic acknowledged his left shoulder diagnosis was progressive osteoarthritis. Dr. Prostic stated claimant's April 2013 x-rays revealed degenerative changes to claimant's left shoulder. Dr. Prostic was unable to testify if the degenerative changes predated April 1, 2010. While Dr. Prostic noted a spur on the x-rays, he testified there was no way he could tell if that was related to claimant's work activity. He testified the changes shown on the x-rays would have taken at least one or two years to occur, but could have taken much longer. The doctor stated claimant's work after April 1, 2010, "can" or "might" cause aggravation of a preexisting degenerative shoulder condition, but he could not say if claimant had any significant disease prior to April 1, 2010.<sup>12</sup>

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<sup>9</sup> Prostic Depo., Ex. 2 at 2-3.

<sup>10</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based on the fourth edition of the *Guides*.

<sup>11</sup> Prostic Depo. at 19.

<sup>12</sup> *Id.* at 22

Dr. Prostic acknowledged claimant did not tell him about repetitive trauma from April 2010 through April 2013, but instead listed a single date of accident on April 1, 2010. Dr. Prostic testified his opinion regarding repetitive trauma was based on claimant's allegation that he continued to suffer injury to the shoulder after April 2010.<sup>13</sup> Dr. Prostic testified his opinion that repetitive trauma on the job caused claimant's injuries was based upon claimant's history of "repetitious, forceful lifting and pulling with worsening of symptoms[.]" in 2013<sup>14</sup> as well as the MRI. Also, Dr. Prostic noted the basis for his conclusion that claimant had repetitious trauma from April 1, 2010 through April 19, 2013, was claimant's attorney's letter stating claimant had a series of injuries during those dates.<sup>15</sup> Dr. Prostic did not know what claimant lifted, how much weight he lifted or how often he lifted objects.

At the September 11, 2014 regular hearing, claimant complained of pain from the top of his left shoulder to an inch or two above his elbow for which he took medication prescribed by Dr. Iliff. While claimant worked briefly for a temporary agency following his employment with respondent, he was not working at the time of the regular hearing.

Claimant testified he believed his pain and range of motion was worse in 2013 than in 2010. He testified he reported the problems in 2013 because his left shoulder was bothering him, he was scheduled to undergo right shoulder replacement and he did not want to "be down with both shoulders hurtin' so bad."<sup>16</sup> Claimant testified he believes he will eventually need a left shoulder replacement. He agreed he was told after his MRI that he had left shoulder arthritis.

In the February 10, 2015 Award, the judge stated, in part:

In this case Claimant had a traumatic incident while at work on April 1, 2010 where he had increased pain in his left shoulder. Claimant chose not to give notice to Respondent about the incident or request medical treatment from Respondent. Claimant sought medical treatment from his doctor and kept on working. In April, 2013 Claimant had an increase in his symptoms in his left shoulder and decided to notify Respondent and request medical treatment from Respondent.

Claimant contends that he has a repetitive trauma injury because Claimant kept working after the trauma in April, 2010. The repetitive trauma came about because Claimant kept working and made it worse.

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<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> R.H. Trans. at 27.

Both doctors who testified in this case acknowledge that Claimant has degenerative conditions in his left shoulder. However, the medical evidence does not show that Claimant's left shoulder got worse in the three years since the April 1, 2010 incident, only that his symptoms worsened.

The Court finds that Claimant has a degenerative condition in his left shoulder that was aggravated and exacerbated to the point that Claimant decided to make a worker's compensation claim in April, 2013. Such circumstances make the 2011 amendments to the Kansas worker's compensation act apply. Under the provision of **K.S.A. (2011 Supp.) 44-510(f)(2)**. Claimant's left shoulder injury did not arise out of and in the course of employment. This claim is denied.<sup>17</sup>

Claimant appealed.

#### **PRINCIPLES OF LAW**

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.<sup>18</sup> The burden of proof shall be on the claimant and the trier of fact shall consider the whole record.<sup>19</sup>

K.S.A. 2012 Supp. 44-508 provides in relevant part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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<sup>17</sup> ALJ Award at 7. The quoted statute, K.S.A. 44-510(f)(2), does not exist. The decision previously cited K.S.A. 2011 Supp. 44-508(f)(2). The judge denied compensation based on an aggravation or exacerbation of a preexisting condition.

<sup>18</sup> K.S.A. 2012 Supp. 44-501b(b).

<sup>19</sup> K.S.A. 2012 Supp. 44-501b(c).

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.



ANALYSIS

**Claimant did not prove he sustained personal injury by repetitive trauma arising out of and in the course of his employment or that his asserted repetitive work was the prevailing factor causing his injury.**

Dr. Prostic testified claimant's pulling on a mud bucket on April 1, 2010, was sufficient to injure his left shoulder. The parties independently confirmed a claim for an April 1, 2010 accident was not timely filed pursuant to K.S.A. 44-534. The real dispute concerns whether claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment for the three-plus years after April 1, 2010, and whether his work was the prevailing factor in causing his injury.

Unlike the appealed ruling, we conclude the record is insufficient to show claimant had a non-compensable aggravation of a preexisting degenerative left shoulder condition. Both physicians agreed claimant has a degenerative left shoulder condition. Dr. Prostic confirmed all of claimant's left shoulder MRI results showed a degenerative condition. Whether such condition was actually "preexisting" was not proven. Also, the record does not demonstrate claimant's injury "solely" aggravated a preexisting condition or rendered symptomatic a preexisting condition. Simply put, the record is vague as to what preexisting condition, if any, claimant had before his asserted injury by repetitive trauma and whether he had any repetitive injuries that would not be sole aggravations.

We agree with the judge that claimant's case is not compensable, but for a different reason. Claimant did not prove injury by repetitive trauma to his left shoulder after April 1, 2010. Claimant told both medical experts, Drs. Stechschulte and Prostic, that he was injured on April 1, 2010 from pulling on a mud bucket. Claimant did not personally inform either medical expert that he injured his left shoulder due to repetitive job duties. Dr. Prostic indicated claimant's left shoulder was injured from April 1, 2010, to April 19, 2013, but that conclusion was based on beginning and ending dates contained in claimant's attorney's letter. Dr. Stechschulte opined claimant's left shoulder condition was degenerative and not due to either the April 1, 2010 incident or repetitive work thereafter.

Both physicians had very little grasp of claimant's job duties. However, it is difficult to ascribe any fault or error on the part of the physicians to not explore the nature of claimant's ongoing work when claimant directed their focus on a specific April 1, 2010 traumatic event. The doctors did not know his job duties, what he lifted, how much he lifted or how often he had to lift items. It is difficult to give much weight to the physicians' opinions regarding an injury being caused (or not caused) by repetitive trauma or that the job duties were the prevailing factor in causing (or not causing) claimant's injury when the nature of the repetitive trauma is not established in the record. Of course, claimant carries the burden of proving the repetitive and injurious nature of his work. He did not succeed in carrying such burden.

All other issues are moot.

**CONCLUSIONS**

Claimant did not prove he sustained personal injury by repetitive trauma arising out of and in the course of his employment or that his asserted repetitive work was the prevailing factor causing his injury.

**AWARD**

**WHEREFORE**, the Board affirms the result of the February 10, 2015 Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2015.

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BOARD MEMBER

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BOARD MEMBER

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